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ROSLEE JALAL v. ZAINAL ABIDIN ABDULLAH

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[ORIGINATING SUMMONS NO: 24NCVC-278-06-2015]
28 MARCH 2016

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LAND LAW: *Caveats – Competing caveats – Removal – Sale of property – Sale and purchase agreements with two purchasers on different occasions – Purchasers entered caveats resulting in competing caveats – Priority over property – Whether applicant was aggrieved party – Whether applicant had caveatable interest – Determination of which private caveat should be removed – National Land Code, s. 327*

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After executing a sale and purchase agreement ('the plaintiff's SPA') for a property with the vendor on 7 March 2011, the plaintiff entered a private caveat on the said property on 30 March 2011. However, it was discovered that another private caveat had been entered by the defendant on the same property on 4 April 2011, following a prior SPA ('the defendant's SPA') executed by the latter and the vendor on 24 January 2011. In the present application, the plaintiff sought to remove the defendant's private caveat on the grounds that (i) he had priority over the said property because the defendant's caveat was only entered subsequent to the plaintiff's caveat; (ii) he was the aggrieved party as defined under s. 327 of the National Land Code ('NLC'); (iii) the defendant's SPA could not be enforced since the defendant failed to obtain the consent from the Menteri Besar; and (iv) the defendant's SPA was only stamped after the plaintiff entered the plaintiff's SPA because evidence showed that the defendant had to pay a penalty for stamp duty. The defendant counterclaimed, seeking removal of the plaintiff's caveat and contended (i) that he was the first to enter into a SPA with the vendor; and (ii) the plaintiff's SPA was null and void and of no legal effect. The issue that arose for the court's determination was which of the two competing private caveats should be removed.

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Held (dismissing plaintiff's application; allowing defendant's counterclaim):

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(1) Private caveat is caveat entered by a private person who has a registrable interest in any property. Section 327(1) of the NLC provides for an aggrieved person of body to apply for the removal of a private caveat. The onus is on the caveator to satisfy the court that he has a caveatable interest on the land. The nature of the onus is that he must first satisfy the court that on the evidence presented, his claim to an interest in the property does raise a serious question to be tried. Having done so, he must go on to show that on a balance of convenience, it would be better to maintain the *status quo* until the trial of the action. (para 28)

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(2) The defendant had instructed his solicitor to submit further application to the relevant authority for approval and that remained pending. It was not for the plaintiff to assert finality in the matter when the same was yet to be decided by the relevant authority. The defendant had paid the full purchase consideration under the defendant's SPA and no opposing or contradictory evidence had been adduced by the plaintiff himself to show otherwise or to suggest that the vendor had terminated the defendant's SPA. Hence, the defendant's SPA remained valid and enforceable. (para 34)

(3) The act of stamping an agreement is merely a formality. Stamping could not validate what is otherwise an invalid agreement and similarly could not invalidate what is otherwise a valid agreement. It is purely for the purpose of the government revenue. The penalty paid showed that the SPA was entered earlier, as affirmed by the defendant. The plaintiff did not reveal the complete history that there was in fact an acknowledgement of receipt as early as 2009 and the SPA was executed and duly registered. (para 35)

(4) The defendant had the legal right to lodge a private caveat over the said property that arose from a valid and completed SPA which was pending registration for the transfer of the said property to the name of the defendant. This transaction was still undergoing the process of transfer at the time of the dispute. When a purchase of a property has performed his contractual obligation upon full settlement of purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he has yet to become its registered owner. (paras 39 & 40)

(5) The defendant had a valid caveatable interest which was legally derived from the SPA entered into with the vendor over the property on 24 January 2011. The plaintiff had entered into a second SPA with the vendor over the same property on 7 March 2011, in breach of the vendor's position as a bare trustee for the defendant over the said property which rendered the plaintiff's SPA defective in law. The vendor was legally constrained to further dispose the said property by sale to any other party for so long as the defendant's SPA remained valid and enforceable. Therefore, the plaintiff's SPA would not be enforceable and he would not derive any registrable interests from an invalid SPA. Consequently, the existence of the plaintiff's caveat could not be defended. The plaintiff's recourse laid instead with the vendor. (paras 43 & 52)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Dato' Ting Check Sii v. Mohamad Tufail Mahmud & Ors [2007] 1 LNS 107 HC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***

JW Properties Sdn Bhd v. Perbadanan Kemajuan Pertanian Selangor & Anor [2016] 1 CLJ 13 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Ng Kheng Yeow v. Chiah Ah Foo & Ors [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 SC ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***

Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 1 LNS 178 FC ***(refd)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1)(a), 326, 327(1), 329

For the plaintiff - Umi Kalsom Abu Bakar; M/s Harrison Raz & Kal
For the defendant - Ashwin Kumar; M/s SA Lingam & Co

Reported by Najib Tamby

JUDGMENT

Hayatul Akmal Abdul Aziz JC:

Introduction

[1] This is an action for the removal of two competing private caveats entered into by both the plaintiff and the defendant respectively pursuant to two purported sale and purchase agreements (SPA) entered into by them with the same registered proprietor of the property known as PM 2505 Lot 13979 Mukim Chenderiang, Daerah Batang Padang Negeri Perak (the said property). The plaintiff filed an originating summons ("the OS") (encl. 1) and the supporting affidavit (encl. 2) seeking an order for the removal of the defendant's caveat under "Perserahan No 258/2011" on the said property while the defendant in his counterclaim in response to the plaintiff's application applied in return, for the removal of the plaintiff's private caveat entered on the said property under "Perserahan No 246/2011".

[2] The parties herein claimed priority in respect of their competing claims before this court in that one claim takes precedence over the other.

[3] The cause papers and written submission for the purpose of this OS are as follows:

(a) Enclosure 1: The OS dated 23 June 2015

(b) Enclosure 2: Plaintiff's affidavit in support affirmed by Roslee bin Jalal dated 23 June 2015

(c) Enclosure 4: Defendant's affidavit in reply affirmed by Zainal Abidin bin Abdullah dated 14 August 2015

(d) Enclosure 5: Plaintiff's affidavit of further reply affirmed by Roslee bin Jalal dated 15 September 2015

(e) Enclosure 11: Plaintiff's additional and corrective affidavit affirmed by Roslee bin Jalal dated 6 January 2016

(f) Enclosure 12: Plaintiff's written submission

(g) Enclosure 14: Defendant's written submission

[4] The defendant filed an application in an attempt to convert this OS into a writ action but it was rejected by the learned Judicial Commissioner at the time, on 18 November 2015.

[5] This OS was heard before this court on 22 January 2016 and after perusing the cause papers filed, respective written submissions of the parties herein and upon hearing further submission by their respective counsels, on balance of probibalities, this court finds that the plaintiff has failed to prove its case and hence the plaintiff's OS was dismissed with cost of RM5,000. This court finds in favour of the defendant as regards to his counterclaim and allowed it with cost of RM5,000. The following are the findings and decision of this court.

Brief Facts

[6] The plaintiff and the defendant have both purportedly entered into SPA over the said property on two different dates. The parties do not dispute that at all material time, the said land was held by one Encik Adzhar bin Mokhtar (KP No: 620717-08-6153), the registered proprietor of the said property (the vendor).

[7] The plaintiff had executed SPA with the vendor for the sale and purchase of the said property for a consideration of RM100,000 on 7 March 2011. After full payment was made and in order to protect his interest on the said purchase, the plaintiff had on 30 March 2011 entered a private caveat under "Perserahan No 246/2011" ("the plaintiff's caveat"). Upon failing to effectuate the transfer of the said property to his name, an inquiry by his solicitor discovered the existence of another private caveat under "Perserahan No 258/2011" ("the defendant's caveat") had been entered by the defendant on the said property on 4 April 2011.

[8] Evidence adduced in this court revealed that the defendant had apparently entered into a prior SPA with the vendor over the sale and purchase of the said property on 24 January 2011 for a consideration sum of RM30,000. Notwithstanding an agreement on staggered payment of the said consideration sum, the full consideration sum was nevertheless paid to the said vendor. The defendant in his affidavit averred that the vendor had surrendered the original issue document of title of the said property to him to enable the defendant to carry out the required transfer and registration of the defendant's name on the said issue document of title. Similarly, for the purpose of protecting his interest in the said purchase the defendant's private caveat under "Perserahan No 258/2011" was entered on the said property.

[9] Hence the present application by the plaintiff seeking to remove the defendant's private caveat with a further order that the defendant is barred from re-registering the caveat on the said property.

Preliminary Issue:
Court's Ruling Regarding The Plaintiff's Affidavit (Encl. 11)

[10] Before the findings of this court is addressed, this court would like to briefly touch on its ruling as regards to the defendant's objection pertaining to the additional and corrective affidavit (encl. 11) filed by the plaintiff.

[11] Counsel for the defendant raised an objection to the inclusion of the plaintiff's additional and corrective affidavit affirmed by Roslee bin Jalal dated 6 January 2016 (encl. 11) on the basis that the plaintiff's counsel was misrepresenting the facts as regards to the date of the filing of the said affidavit which was presented as being filed on 25 November 2015 when in actual fact it was subsequently discovered to have been made on 26 November 2015. The defendant's counsel submitted that the service of the said affidavit ought to have been done on 26 November 2015 but it was only served on 3 December 2015, which clearly would appear to be in breach of the direction of this court for the said affidavit to be filed on or before 25 November 2015. On the basis of this non-compliance submitted counsel for the defendant, the said affidavit ought not to be admitted and considered.

[12] Counsel for the plaintiff justified the delay by submitting that on 25 November 2015 there was a technical problem with the e-filing system and that was why it was only done on 26 November 2015. They admitted that they served the plaintiff's counsel on 3 December 2015 but argued that the delay was only for a few days. The plaintiff's additional and corrective affidavit was filed and served before submission was due and hence it was not prejudicial to the defendant.

[13] On the issue of non-compliance of the court's order, this court is guided by the various decisions of our apex court which has on numerous occasions emphasised that matters must be heard on merits and must not be dismissed for non-compliance of rules, unless such non-compliance cannot

be remedied and/or compensated by costs. See Justice Hamid Sultan (as he then was) in *Dato' Ting Check Sii v. Mohamad Tufail Mahmud & Ors* [2007] 1 LNS 107 held as follows:

> 15. Court's time is often unnecessarily wasted by procedural objections and technicalities raised without regard to rules and case laws which condone procedural non-compliance. To avert frivolous objections, it is an opportune moment to summarise the rules and principles in vogue and they are as follows:
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> (a) As a general rule, the parties to a civil proceeding must strictly comply with the rules of the court. However, where parties have by reason of anything done or left undone failed to comply with the requirements of the rules of the court, whether in respect of time, place, manner, form or content or in any other respect, the court is required to treat the failure of non-compliance as an irregularity and the failure does not nullify the proceedings or any steps taken in the proceedings or any documents, judgment or order therein. This rule has a number of exceptions and will only appear to cover steps taken in the course of commencement of any proceedings and will not include any steps which is a condition precedent before instituting proceedings.
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> (b) Dismissal of an action for non compliance of procedural rules has been an anathema in procedural jurisprudence. To avert procedural miscarriage of justice, order 2 of the Supreme Court Practice (white book) was introduced in England. It was meant to be a saving provision to condone procedural irregularities. However, some English judges often defied this sacrosanct provision and in consequence matters were dismissed without merits being heard. The English position is aptly described by Sir Jack I.H. Jacob in his book "*The reform of the Civil Procedure Law and other Essays in Civil Procedure London*", 1982, London, Sweet & Maxwell at page 214 as follows:
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> > A change of fundamental importance was made in relation to the effect of non-compliance with the requirements of the Rules. In all such cases, such non-compliance whatever form it takes must be treated, not as a nullity, but as an irregularity which the court will have power to amend or rectify or regularise. This power, together with the extended powers of amendments after the expiry of the current period of limitation, is intended to prevent technical defects or errors in proceedings from being fatal in themselves and to remove some of the blots which "have marred our copybook." They go a long way towards reaching out to the rather exuberant remark made by Lord Bowen that "It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." This ideal state has yet to be achieved.

[14] Justice Abdul Hamid Mohamad FCJ sitting in the Court of Appeal in the case of *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, held that the main function of the court is to do justice and not just to dispose cases (emphasis is mine). Further, His Lordship stated that it was unjust to dismiss a matter without hearing merits simply because of the mistake of the solicitor in not complying with the rules.

[15] This court is also guided by the observation of Suffian LP in the case of *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 1 LNS 178; [1975] 2 MLJ 188 where His Lordship observed: "**The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice**." (emphasis added).

[16] Therefore, it is clear that this court has a wide discretion whether to condone or not to condone irregularities bearing in mind that the Rules of Court 2012 are intended to facilitate, not impede, the administration of civil justice. This court made the ruling that the affidavit filed (encl. 11) can be considered in making this decision because this court is of the opinion that the instruction given by the learned Judicial Commissioner at the time was that the affidavit to be filed on or before 25 November 2015. This court finds that the affidavit was filed a day later and the reason given was reasonable and acceptable where there was in fact no inordinate delay on the part of counsel of the plaintiff. Though the plaintiff was only served with the affidavit on 3 December 2015, this court holds that it had not in any way prejudiced the plaintiff since it was in fact served on them one and half months before the hearing of this OS.

[17] This court also finds that the affidavit (encl. 11) is merely a corrective affidavit to rectify typo error in his earlier affidavit and in the circumstances it would be unjust not to consider the said affidavit simply because of the failure of the solicitor in failing to comply with the instruction given by this court in the circumstance that it was in, and to the fact that the issue of prejudice does not arise. Hence in the interest of justice and fairness to parties, encl. 11 can be considered by this court in arriving at its decision herein.

The Plaintiff's Case

[18] In his affidavit in support (encl. 2) the plaintiff averred that he entered into a SPA with the vendor over the said property on 7 March 2011 (the plaintiff's SPA) for a consideration of RM100,000 (exh. "RJ-1") not knowing that the vendor had prior to this date, already entered into a prior SPA with the defendant (the defendant's SPA) on 24 January 2011. No evidence had been tendered by either party to show whether the vendor had failed to mention or in fact disclosed this fact to the plaintiff. After making full payment of the purchase consideration and upon the advice of his solicitor with a view to protect his interests, the plaintiff had on 30 March 2011 entered the plaintiff's caveat (exh. "RJ-5" – encl. 11) on the said property.

[19] Subsequently, after failing to effectuate the transfer of the said property to the plaintiff's name, the plaintiff's solicitor made a search on the said property on 19 March 2011(exh. "RJ-2") and found the existence of the defendant's caveat on the said property entered on 4 April 2011 which had encumbered the transfer of the said property to the plaintiff's name.

[20] The plaintiff averred that he has priority over the said property because the defendant's caveat was only entered subsequent to the plaintiff's caveat. And on 30 April 2011 through his solicitor, the plaintiff issued a notice (exh. "RJ-3") to the defendant demanding the removal of the second caveat. And the plaintiff avers that he is the aggrieved party as defined under s. 327 of the National Land Code (Act 56) (the "NLC").

The Defendant's Case

[21] In his affidavit in reply (encl. 4) the defendant averred that he was the first to enter into a SPA with the vendor over the said property, ie, on the 24 January 2011 for a purchase consideration of RM30,000 (exh. "ZA-1") which had been fully paid to the vendor and consequently therefore the plaintiff's SPA which is subsequent to this is deemed null and void and of no legal effect.

[22] The defendant denies the allegations as contained in the plaintiff's affidavit and instead averred that he is the aggrieved party as defined under s. 327 of the National Land Code (Act 56) (the "NLC") since he was the earlier a lawful purchaser to the said property.

[23] The defendant filed a counterclaim seeking the removal of the plaintiff's caveat entered on the said property.

Issue To Be Tried

[24] From the cause papers filed and the submissions of the respective parties, this court finds that there is only one issue for this court to consider, ie, which of the two competing private caveats should be removed?

Findings Of This Court

[25] Counsel for the plaintiff submitted that the OS application is brought under ss. 323, 327 and 329 of the National Land Code (NLC).

[26] The law as it stands, a private caveat can be entered by three categories of person on any land as provided for under s. 323 of the NLC.

> s. 323(1) The persons and bodies at whose instance a private caveat may be entered are:
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> (a) Any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such little or interest;
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> (b) Any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

A (c) The guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b)

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the
B nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or an undivided share in the land or a particular interest only.

(3) Any application under this section shall be accompanied by:

(a) The prescribed fee;

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(b) The grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and

(c) If relating to a part of the land, a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof, a description, which is sufficient for identification.

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[27] Any person or body aggrieved by the existence of a private caveat may at any time apply either to the Registrar of Title under s. 326 of the NLC or to the court for an order for its removal as provided for under s. 327 of the NLC

E Removal of private caveats by the Court

s. 327. (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

F (2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.

(3) Every cancellation under subsection (2) shall be signed and sealed.

G **[28]** Private caveat is caveat entered by private person who has a registrable interest in any property. Section 327(1) provides for an aggrieved person of body to apply for the removal of a private caveat. The onus is on the caveator to satisfy the court that he has a caveatable interest on the land. The nature of the onus is that he must first satisfy the court that on the
H evidence presented to it his claim to an interest in the property does raise a serious question to be tried. And having done so, he must go on to show that on balance of convenience it would be better to maintain the *status quo* until the trial of the action. (See *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212)

I **[29]** The Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520 laid down a three-stage test which must be considered when evaluating whether a caveat ought to be removed or otherwise:

> The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.
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> Once caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest, he must go to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. Then this is the second stage.
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> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 as "the balance of convenience". As to the matters that go to determine which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong & Ors* that mere repetition becomes unnecessary ...

[30] At the first stage of the inquiry, the court "should confine itself to the caveat and other supporting document." (per Seah FCJ in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446). Any person or body who claims either the title to land or any registrable interest in land, or any right to such title or interest would have a caveatable interest. The onus is on the caveator, in this case the defendant, to satisfy the court why his caveat should not be removed.

[31] The claim of the caveator that he has a right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed. This court will now examine whether the defendant has the required caveatable interest.

[32] The evidence disclosed in the defendant's affidavit (affirmed on 14 August 2015 (encl. 4) clearly revealed that he has a caveatable interest in the said property since he has purchased the said property from the registered owner which can ultimately lead to its registration. This court is convinced by the exhibits in the defendant's affidavit that the defendant had paid the plaintiff the consideration sum in full was in the process of undertaking the registration of the transfer of the said property to his name.

This court refers to the following:

(a) Exhibit "ZA-2" which enclosed the "akuan penerimaan and akujanji" where the vendor acknowledged the receipt of RM15,000 from the defendant as part of the purchase price and the balance of RM15,000 to be paid once the Menteri Besar's approval is obtained. This court takes cognisance that the said "akuan penerimaan" was dated 16 December 2009 which is earlier than the plaintiff's SPA.

For ease of reference this court hereby re-produced the relevant "akuan penerimaan" as follows:

AKUAN PENERIMAAN DAN AKUJANJI

Saya ADZHAR BIN MOKHTAR (No KP 620717-08-6153) sebagai penjual dengan ini mengaku menerima sebanyak RINGGIT MALAYSIA LIMA BELAS RIBU (RM15,000.00) sahaja daripada Pembeli iaitu ZAINAL ABIDIN BIN ABDULLAH (No KP:561024-08-6401) yang merupakan setengah (1/2) daripada harga jualan bagi tanah pertanian yang dikenali sebagai PT 4777, Mukim Chenderiang, Daerah Batang Padang, Perak Darul Ridzuan yang mempunyai keluasan 3 ekar mengikut syarat-syarat yang dinyatakan di dalam Surat Perjanjian Jual beli yang disempurnakan serentak pada hari ini.

Saya dengan ini mengaku janji dan bersetuju bahawa sekiranya tanah ini tidak dapat dipindah milik kepada pihak Pembeli yang dinamakan di atas dan setelah hak milik individu tanah tersebut dikeluarkan Pihak Yang Berkuasa, maka saya akan mengembalikan jumlah wang sebanyak RM15,000.00 tersebut kepada pihak Pembeli.

Saya juga mengesahkan bahawa harga jualan tanah tersebut adalah RINGGIT MALAYSIA TIGA PULUH RIBU (R30,000.00) sahaja dan baki sebanyak RM15,000.00 akan hanya dibayar Pembeli setelah hak milik individu tanah tersebut dikeluarkan Pihak Yang Berkuasa Negeri dan kelulusan pindah milik oleh Menteri Besar Perak diperolehi.

Bertarikh 16 haribulan Disember 2009.

(b) Exhibit "ZA-1" which encloses the defendant's SPA dated 24 January 2011 showing the stamp duty paid on 23 March 2011 and attested by the solicitor Khalidah bt Khalil. The said defendant's SPA acknowledges that a deposit of RM22,500 was paid by the defendant and the said payment was received by the vendor. Exhibit "ZA-3" is the letter dated 24 January 2011 written by the defendant's solicitor (Khalidah bt Khalil) to the Land Office to obtain consent from the Menteri Besar of Perak for transfer of the said property. Exhibit "ZA-6" is the power of attorney executed by the vendor granting the defendant an "Irrevocable Power of Attorney" (the said PA) dated 25 March 2011. The said PA was duly stamped and attested by the solicitor Khalidah bt Khalil. Exhibit "ZA-8" is the acknowledgment of receipt of the final balance of purchase price for the amount of RM7,500 paid by the defendant and received by the vendor and attested by the solicitor Khalidah bt Khalil.

[33] The defendant has also enclosed the Form 19B marked as exh. "ZA-5" his application for the caveat, para. 2 which stated his reasons as follows:

Alasan-alasan tuntutan saya ke atas tanah/kepentingan itu ialah:

Saya telah menandatangani Perjanjian Jual beli bertarikh 24-01-2011 dengan tuan tanah serta membayar jumlah penuh harga belian tanah sebanyak RM30,000.00. Sementara pindah milik

belum didaftarkan ke dalam nama saya, kaveat ini amatlah perlu untuk menjaga kepentingan saya sebagai pemilik benefisiari tanah itu.

[34] The plaintiff averred that since the defendant failed to obtain the consent from the Menteri Besar, the first SPA cannot then be enforced. This court disagrees with this contention by the plaintiff because this court finds that the defendant had instructed his solicitor to submit further application to the relevant authority for approval and that remains pending. It is not for the plaintiff to assert finality in the matter when the same has yet to be decided by the relevant authority. The evidence goes further to show that the defendant had paid the full purchase consideration under the SPA and no opposing or contradictory evidence has been adduced by the plaintiff himself to show otherwise or to suggest that the vendor had terminated the defendant's SPA, or whether the vendor had forfeited the sum of RM30,000 paid to him by the defendant or that he had returned the said sum to the defendant or that he had called off the transaction. Hence the SPA entered between the defendant and the vendor remains valid and enforceable.

[35] The plaintiff also disputes the date of the defendant's SPA and avers that the said SPA was only stamped after the plaintiff entered the SPA with the vendor and that is why the defendant had to pay a penalty for stamp duty. This court disagrees with this submission and holds that the act of stamping an agreement is merely a formality. Stamping cannot validate what is an otherwise an invalid agreement and similarly cannot invalidate what is an otherwise a valid agreement. It is purely for the purpose of Government revenue. The penalty paid goes to show that the SPA was entered earlier and in this case, it was entered on 24 January 2011 as affirmed by the defendant. This court also finds that the plaintiff did not reveal the complete history that there was in fact an "akuan penerimaan" as early as 2009 and PA was executed and duly registered. This crucial fact was not revealed in the plaintiff's earlier affidavit. It was instead disclosed in the defendant's affidavit in reply.

[36] Although it is trite law that the onus lies on the caveator to satisfy the court as to why his caveat should not be removed if challenged, this court is of the considered view that it is equally important for the party who comes to the court in an application to remove an impugned caveat to do so by making full and frank disclosure of the material facts leading to the entry of the impugned caveat. An application to the court for a removal of a private caveat must be supported by reliable evidence and a full and frank disclosure of material facts. He who relies on s. 327 of the NLC for the assistance of the court must come with complete disclosure of all material facts. In this regard this court finds that the plaintiff had failed to do so.

[37] The plaintiff's counsel submitted that Form 19B submitted by the defendant or through his solicitors failed to enclosed any SPA or any statutory declaration to support the defendant's application for caveat. This

court does not agree with this technical issue raised by the plaintiff because at the end of the day, the entry of the defendant's caveat was nevertheless approved by the Registrar of Titles and this court finds that the said Registrar had rightfully exercised his discretion in matters that relates to the exercise of his discretionary powers.

[38] Now let us look at whether the defendant has a right or is authorised to lodge a private caveat on the said property as provided for under s. 323(1)(a) of the NLC? This court refers to Federal Court's decision in *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802 that held; only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Tun Ariffin Zakaria (CJ) in his pronouncement said:

> It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest. Emphasis should be given to the words 'registrable interest' in s. 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[39] From the evidence adduced before this court, it is this court considered view that there is sufficient evidence to safely conclude that the defendant has the legal right to lodge a private caveat over the said property that arises from a valid and a completed SPA (the defendant's SPA entered on 24 January 2011) which is pending registration for the transfer of the said property to the name of the defendant. This transaction is still undergoing the process of transfer at the time of the dispute. At this juncture this court would like to point out the position of the law as pronounced by the Right Honorable Tun Ariffin Zakaria CJ in the case *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193 where in His Lordship's speech it was said that:

> (1) According to the principle of beneficial ownership, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price, besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he has yet to become its registered owner. In the circumstances, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property.

[40] Therefore, it would follow that when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the

registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.

[41] This principle of beneficial ownership was referred to by Justice Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; where he said:

> ... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then the vendor divest himself of his interest in the land.

[42] In the case *Tan Ong Ban v. Teoh Kim Heng* (*supra*) the Right Honourable Tun Arifin Zakaria CJ went on further to say that:

> (2) The principle of beneficial ownership as enunciated in *Borneo Housing* applies equally to both negotiated contracts as well as statutorily formatted contract. The intention of the Act as well as all the subsequent Enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity.
>
> (3) It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the NLC. Any transaction which was not done in accordance with the then existing law relating to registration of title, conferred no real right to the land but merely a contractual right. Based on the ordinary sale and purchase transaction, the purchaser will acquire a right *ad rem* or a right *in personam*. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property.

[43] Consequently, the vendor in the present case would not be at liberty to enter into a new SPA with any other party without lawfully resolving and or legally terminating the defendant's SPA. The vendor by virtue of the defendant's SPA has been reduced to a bare trustee over the said property holding it on trust for and on behalf of the defendant pending the conclusion of the said transaction. In the premise the legality of the subsequent SPA entered into between the vendor and the plaintiff becomes highly questionable for want of authority. In such circumstances the vendor would be legally constrained to further dispose the said property by sale to any other party for so long as the defendant's SPA remains valid and enforceable. Therefore, this court would conclude that the plaintiff's SPA (30 March 2011) would not be valid and enforceable in light of the foregoing circumstances. That being the case, this court also holds that the plaintiff

would not derive any registrable interests from an invalid SPA and consequently the existence of the plaintiff's caveat on the said property cannot be defended. The plaintiff's recourse lies instead with the vendor since the vendor could not in the circumstances of the case pass a better to title to the plaintiff than the one he has. Consequently, it would follow that in respect of the plaintiff's caveat, he would not have passed the required test in the *Luggage Distributors (M) Sdn Bhd* case (*supra*) grounded on the basis of an invalid SPA, unlike that of the defendant's as mentioned above.

[44] This court is also required to determine whether the defendant has the required 'registrable interest' as provided under s. 323(1)(a) of the NLC where it has also been said that, it must represent a transaction that can ultimately lead to its registration on the register. Based on the defendant's SPA which remains valid and enforceable, unless and until it is legally terminated and or there is evidence to the contrary this court holds that the defendant has the requisite interest arising under the said SPA that is capable of being registered under the NLC.

[45] It has to be said at this juncture that the plaintiff's SPA does not in itself create an interest within the meaning of s. 323 of the NLC. What is important would be the status of the agreement itself. If the agreement in question does not confer legitimate rights to an interest in land such an agreement would not be said to cloth the party holding on to such an agreement with caveatable interests for the purpose of s. 323 of the NLC. Such is the case with the plaintiff's SPA for reasons as set out above. This court is guided by the Federal Court's decision in the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 which held that:

> The contractual provision does not create an interest within the meaning of section 323 of the NLC. Interests which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the NLC sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words "any right to such title or interest" may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land.

Caveat Is Just A Notice

[46] In this case, the plaintiff entered his caveat on the 30 March 2011 whereas the defendant registered his caveat later on the 4 April 2011. In this instance, would it mean that plaintiff's caveat would take precedence over the defendant's since the plaintiff's caveat is the first in time? This court is

of the opinion that the caveat entered was just a notice and not creating right or interest. This court finds support in the case *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ where Ramly Ali FCJ delivering the judgment of the court said at para. 5:

> In law, a caveat did not create any rights or interest. As such, the failure on the part of the respondent to lodge a caveat timeously, did not in any way negate or defeat its equitable rights, title and interests in respect of the lots. Further, the case of *Jasalam (M) Sdn Bhd* cited by the appellant as authority for its argument that the respondent by its omission had itself to blame for having lost its priority over the lots could be distinguished from the present case. In the present case there were no two parties with valid equitable interests in the land in question but only one party (ie, the respondent) who claimed to have an equitable interest in the said land as against the other party (ie, the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s. 340(2)(b) of the NLC.

[47] The pronouncement in the aforementioned case is somewhat similar to the present case, where the defendant relies on an agreement that is valid and enforceable while the plaintiff on the other hand is attempting to enforce an agreement which on the face of it is obviously unsustainable. The defendant's counsel also referred to the case of *JW Properties Sdn Bhd v. Perbadanan Kemajuan Pertanian Selangor & Anor* [2016] 1 CLJ 13 where the Court of Appeal held in favour of JW Properties despite the fact that 20 years have gone by and JW Properties did not enter the caveat and yet the decision was still given to those who has the lawful right to deal with the property.

[48] The plaintiff also touched on the defendant's failure to lodge its private caveats following its "akaun penerimaan" dated 16 December 2009 timeously so as to protect his interest in the said property. The plaintiff's contended that the defendant had himself to blame for and such failure was fatal to his case. This court does not agree with the submission by the plaintiff's counsel, it is the considered view of this court that even though the defendant delayed in registering his caveat, it did not deprive him in having a better equity against the plaintiff. This court finds support in the case of *Samuel Naik Siang Ting* (*supra*) where Federal Court held that:

> In our judgment, the appellants' failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents in as much as the prohibitory order could not override the beneficial interest of the appellants in the properties attached. Moreover, the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent or until the caveat is removed by a court order ...
>
> Adopting the above principle to the facts of the present case before us, we find that the failure on part of the respondent to lodge a caveat timeously, does not in any way negate or defeat its equitable rights, titles and interests in respect of the lot in question.

A The case of *Jasalam (M) Sdn Bhd* as cited by the appellant earlier can be distinguished. The issue in that case is different from the issue in the present case. There, the Court of Appeal was considering, *inter alia*, the priority of two parties with valid equitable interest in the land in dispute. In that case, the Court of Appeal followed the principle established in an Australian case of *Butler v. Fairclough*, 23 CLR 78, that in "the case of a B contest between two equitable claimants, the first in time, all other things equal, is entitled to priority."

In our view the principle as adopted in *Jasalam (M) Sdn Bhd* cannot be applied to the present case for the simple reason that in the present case we are not dealing with two parties with valid equitable interests in the C land in question; but with one party (ie, the respondent) who claimed to have an equitable interest in the said land as against the other party (ie, the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s. 340(2)(b) of the NLC.

D

[49] In terms of priorities of equities between the two competing claims, it has to be said here that in the present case we are not dealing with two parties with valid equitable interests in the land in question; but with one party (ie, the defendant) who claimed to have an equitable interest in the said property as against the other party (ie, the plaintiff) who had purchased the E said property based on a void and invalid sale and purchase agreement as elaborated above. The existence of a priority situation in a given interest in land presupposes that there is more than one dealing and that these dealings are all formally valid (as opposed to the facts in the present case), that is, the formalities required by law for the creation of the interest have been fully F complied with.

[50] This court refers to the decision of the Supreme Court referred to by the defendant's counsel in the case of *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 where it was said that:

G ... the submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors have executed the memorandum of transfer in his favour. Also, most important the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. H However, we are satisfied that on the facts he has the better equity.

Defective Intitule On The OS

[51] This court would like to add on a very fundamental observation as regards to the plaintiff's OS as found in encl. 1. It is to be noted that the I intitule of the said OS had made reference to the wrong caveat presentation number (246/2011) as being that of the defendant when the same belongs to the plaintiff. The correct caveat presentation number belonging to the defendant is 258/2011 as can be seen in encl. 4 exh. "ZA-5".

Unfortunately, this error was never corrected by the plaintiff even though he had a chance to do so in his corrective affidavit in encl. 11 right up to the conclusion of the hearing of this matter before this court. The plaintiff merely enclosed the plaintiff's private caveat application form in encl. 11 exh. "RJ-5" but without attending to the error as mentioned in the OS. Notwithstanding the fact that this error was never disputed or brought up by the parties during the trial of this action, this court still holds that such fundamental defect that stood uncorrected would be fatal to the plaintiff's case as the law is settled in such matters. It is to be mentioned that on this ground alone the plaintiff's action could be dismissed.

Conclusion

[52] In light of the foregoing and after closely scrutinising and examining all evidence adduced before it, this court in the upshot concludes that the defendant has a valid caveatable interest which was legally derived from the sale and purchase agreement entered into with the vendor over the said property on the 24 January 2011, whereas the court finds that the plaintiff had entered into a second sale and purchase agreement with the vendor over the same said property on the 7 March 2011 in breach of the vendor's position as a bare trustee for the defendant over the said property which renders the plaintiff's SPA defective in law. This court hereby dismisses the plaintiff's action seeking the removal of the defendant's caveat with cost of RM5,000.

Counterclaim

[53] In regard to the defendant's counterclaim, on the basis of the findings of this court as set out above, the said counterclaim is allowed with cost of RM5,000 and it is hereby ordered that the plaintiff's caveat under Perserahan No. 246/2011 be immediately removed by the Registrar of Titles. Parties agreed not to proceed with the assessment of damages.